Central Law Journal.

ST. LOUIS, MO., JUNE 3, 1910

PUBLIC POLICY GIVING TO PRIVATE USE THE RIGHT OF EMINENT DOMAIN.

By the decisions in Clark v. Nash, 198 U. S. 361, and Strickley v. Highland Boy Mining Co., 200 id. 527, conception of what might come under the designation of a public use, so as to authorize the taking of property by proceedings for condemnation, has been very greatly broadened. Were this not so, we would fail to understand how the legislature of Massachusetts ever would have thought of submitting to the Justices of the Supreme Judicial Court of Massachusetts inquiry as to the constitutionality of such an eminent domain statute as was proposed to be enacted in the event of an affirmative reply. In re Opinion of the Justices, 91 N. E. 405.

The justices answered negatively, however, and it appears to us that there is something of a contrast between what they say and the views expressed by Justices Peckham and Holmes in the Clark and Strickley cases. Other readers might not think there is any necessary conflict between these cases, but to us the opinions breathe a very different spirit—the state court holding firmly to old traditions, and the federal court trying to accommodate them to new conditions.

The Massachusetts inquiry recited, that the commercial interests and general prosperity of the inhabitants of the commonwealth, and particularly of the city of Boston, were dependent on that city having facilities for the transaction of foreign and domestic trade the same as other cities, and the narrow and tortuous streets in that part of Boston attempted to be used were insufficient, unless the city should both be allowed to condemn land in straightening and broadening those streets and acquiring abutting and intervening broken parcels of lots for warehouses and other structures to be held in private ownership with restrictions to business uses promotive of trade and commerce.

The court, after conceding the city's right to condemn for street purposes, said: "The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of property to obtain the possible income or profit that might inure to the city from the ownership and control of it would not be a public use." Further on the court stresses strongly, by repetition and otherwise, that the benefit to the public must be direct and not incidental. "However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental."

But do the Strickley and Clark cases proceed upon any such theory? The Utah constitution declared that among the public purposes authorizing the taking of private property by condemnation were "roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores or the working of mines."

The Strickley case relied on the Clark case in affirmance of the state supreme court allowing condemnation of a right of way across another's land by a corporation for structures for an aerial bucket line in the working of its mines. Mr. Justice Holmes said the Clark "case established the constitutionality of the Utah statute so far as it permitted the condemnation of land for irrigation of other land belonging to a private person, in pursuance of the declared policy of the state."

That seems a tremendous stretch to go, and the justice shows what was deemed its justification by stating the theory upon which the Clark case proceeded as follows: "While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which under other

circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment, which prevents a state from requiring such concessions. In the opinion of the legislature and the Supreme Court of Utah, the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in its valleys below should not be made impossible by the refusal of a private owner to sell the right across his land. The constitution of the United States does not require us to say that they are wrong."

These words either mean that a private use, working incidentally only to a public benefit, may claim the right of eminent domain or they are so very ambiguous as to reflect little credit upon the writer of this opinion. If they do mean this, they seem very squarely opposed to what is said by the Massachusetts Justices in their reply to the Masachusetts legislature.

Justice Peckham, speaking in the Clark case, said: "The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use even by an individual, where, in the absence of such facts the use would be clearly private."

The only use in the case before the court was that of a way for a ditch to be used in the irrigation of a particular tract of land, the crop and profits from which were to be the exclusive property of the owner of the land. The policy of the state was that all irrigable lands should be irrigated.

The common thought is that the exercise of the right of eminent domain is largely the basis of our right to call carriers and some other avocations public utilities, which come under the yoke of legislative regulation.

But in the Utah statute and others of its kind in arid and mining states the exercise of the right of eminent domain has its supposed justification in what subserves, either directly or indirectly, a public policy.

Justice Holmes speaks of conditions in laying the foundations of public welfare as justifying the compelling of "concessions (of property rights) from individuals to each other." In Massachusetts it might very plausibly have been argued that *preserving* the foundations of prosperity affords similar justification.

It does not seem a very far cry from what was declared constitutional in the federal cases to what the Massachusetts legislature was seeking to obtain. The federal cases tend to bring confusion in the application of an ancient and well-established rule, and the Massachusetts opinion helps to hold us to old moorings, and the unassailable right of private ownership.

NOTES OF IMPORTANT DECISIONS

EMINENT DOMAIN—UNITING ESTATES SO AS TO INCREASE DAMAGES.—The case of Boston Chamber of Commerce v. City of Boston, 30 Sup. Ct. 459, proves very conclusively that the way one restricts his estate in favor of another may operate very decidedly to the advantage of the public in respect to the amount of damages that may be claimed in condemnation proceedings.

It appears that the Boston Chamber of Commerce owned a triangular parcel of land, upon the base of which was a building. The apex of the triangle was taken by the city of Boston for a street. The Central Wharf and Wet Dock Company had an easement of way, light and air over the condemned land. By the taking the city superposed a public, upon this private, easement. It was sought by the Chamber of Commerce and the Dock Company to unite their estates and claim for damages for property taken as of an unrestricted estate. Upon the city objecting it was stipulated that, if this uniting of estates could be claimed, the damages should be assessed at $60,000, and if not only $5,000. From a decision by the Massachusetts Supreme Judicial Court, holding in favor of the city's contention, appeal was taken to the federal Supreme Court. See same case, 195 Mass. 338, 81 N. E. 244.

The federal question raised was, that there was a violation of the Fourteenth amendment in denying the right of the owners of the dominant and servient estates to pool their interests. As to this, Mr. Justice Holmes says:

"The petitioners contended that they had a right, as matter of law, under the constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence

of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate—in other words, that the servitude must have been maintained in the interest of lands not before the court—but still, according to the contention, by a simple joinder of properties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.

"The statement of the contention seems to us to be enough. It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery.

* * * * * *

"But the constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not tracts of land. And the question is: What has the owner lost? not: What has the taker gained? We regard it as entirely plain that the petitioners were not entitled, as matter of law, to have the damages estimated as if the land was the sole property of one owner."

The city's contention was, that, as the restriction in favor of the Dock Company was very valuable, the damage to the market value of the estate to the Chamber of Commerce was little or nothing, and the Dock Company lost nothing at all "by the superposition of a public easement upon its own." Suppose, however, the Dock Company had obligated itself to pay an annual sum for that easement, with forfeiture in case of non-payment, would not the owner of the fee be deprived of his ability to enforce forfeiture? Or could it claim this annual sum at all, if the easement formerly given by this owner is being derived, not from the owner, but through the city? If it is so that nothing substantial was being taken from either of the petitioners, this seems more fortuitous than otherwise. Another such case, wholly on all fours, might never arise.

CRIMINAL LAW—WEARING BADGE AS EMBLEM OF SECRET SOCIETY BY A NON-MEMBER.—In the case of Hammer v. State, 89 N. E. 850, our attention is called to affirmance of a conviction of one charged with unlawfully wearing the balge and emblem adopted by an incorporated society of Indiana, the defendant not being at the time a member thereof. The theory of the statute is that this is a police regulation directed against false personation and false pretenses. The court says: "The statute does no more than make a misdemeanor of that which at common law was indictable as a 'cheat' independently of our statute as to false pretenses and false personation." This is an assumption which we are indisposed to speak upon, but we rather think a conviction independently of such a statute would be difficult to make stand.

Taking the view, then, that the statute creates a new offense, we think the Indiana court is certainly correct in holding it has no relation whatever to creed, religion or mode of worship. We also are in agreement with the court that for a non-member to wear a badge or emblem of an order or society "is and of itself a deceit and false pretense, and its object could be nothing else than deception, which it is in and of itself, with possibly ulterior motives," and "it is evidence of the first act of an imposter in the course of a premeditated design to prey upon those who from fraternal, charitable or sympathetic motives become the victims of false personation, imposition and fraud, whether members of the society or not."

But what seems strange to us is that a statute of this kind makes a classification between secret and non-secret societies, when the only basis that can sustain it is fraternity. It seems to us that secrecy is an arbitrary classification, and carries an assumption of justification which may not exist in fact. Indeed, secrecy is nothing that the public has any interest in at all, while fraternity in the accomplishment of a common worthy purpose is of concern to the state, and has a right to its protection.

And, also, that a society should be incorporated appears to us another arbitrary classification. The law recognizes benevolent and religious associations, incorporated and unincorporated, and we see no reason why the latter should be left out of protection, or why the public may not be as much harmed by imposters as to them as to those which are incorporated.

The classification adopted by the statute seems to us an unconstitutional one, and, therefore, it should be declared invalid.

In State v. Holland, 37 Mont. 393, 96 Pac. 719, there was a conviction under a statute forbidding wearing by a non-member of a badge of Grand Army of the Republic, etc., of the Elks, K. P., labor organizations, "or any society, order or organization of ten years' good standing in the state of Montana," with a proviso in favor of wives, daughters, sisters or mothers of members in good standing." The general words of the statute were limited by the principle of id omne genus, and its general constitutionality upheld on the right of the

state to prevent the principle of fraternity and charity being exploited by imposters on members and the general public, but further attack upon its constitutionality was sustained upon the ground, that there was a vesting of legislative power in such societies, as no citizen could tell from the text when he is subject to its penalties, and badges being changed, what would be an offense or an innocent act to-day would be changed to-morrow. Then, also, the proviso was held to create a classification obnoxious to the Fourteenth Amendment, in its guarantee of "equal protection of the laws."

The former objection, applicable to the Indiana statute, appears quite tenable, and it and the arbitrary classification which we spoke of, supra, make, in our opinion, the Indiana statute unconstitutional.

"THEORY OF THE CASE." WRECKER OF LAW.*—III.

Perhaps one of the most serious troubles with the law to-day, as has been pointed out in a previous article of this series, is the failure to understand the fundamental difference between the common law, or mandatory record, or "record proper," and the bill of exceptions or "statutory record." The difference involved goes to the root of the law, and yet owing to fancied distinctions between "substantive" and "adjective" law, the former being treated as all important, and the latter as merely subsidiary, our students are being impressed with the idea that the study of adjective law deserves but a small portion of their time in the school, and that its principles can be picked up in practice, without instruction.

The result is that men trained thus get into the profession and on the bench imbued with the idea that adjective law being technical (which it is), there must be found some way of eliminating the "technicality." They desire, laudably enough, to "get at the merits," but being untrained to see that the "merits" can be known to the court only through the pleadings and other parts of the record prescribed by law, they become impatient of the restraint imposed, depart from the state's record, allow the parties to raise new and unpleaded issues, and in doing so actually believe they are expediting the cause on its "merits."

And when the practitioner objects to having his client's rights trampled upon in this manner, he incurs the animadversion of the trial court, often in the presence of the jury.

Multitudo imperitorum perdit curiam.

Now, the position taken in this series of articles is that "form" is just as necessary in the law, if its symmetry is to be preserved, and justice is to remain certain, as it is in engineering, chemistry or medicine; or as it is in baseball, or tennis, for that matter. If you want to make an effective stroke in golf, or an effective punch in the prize ring, you must do it according to form. All of which simply means that there are principles underlying all human effort, which, if observed, make the effort effective; if not observed, make it abortive or inefficient.

So in the law,—its effort is to keep the peace of the state, to settle, to finish litigation. *Interest reipublicae ut sit finis litium.* But this does not mean indiscriminate haste. It means that a cause must be settled according to prescribed rules, to the end that when it is once decided, it will be in fact "settled." The cause must not be left, after judgment, in the chaotic condition of having pleadings setting forth one cause of action, evidence developing another, and perhaps a judgment based upon both, or neither. This is not speculation. Specific instances can be given where exactly these things have happened.

The technics of the law must be observed, or the law will be destroyed. We are drifting that way at present. Why do not the members of the bar who believe so, and who are saying so, on all sides, make their protest effective?

It can be shown that a knowledge of the principles of the very subject which has been so long neglected—practice and procedure—would go far to remedy the disease, and to restore the harmony of the law.

*For two former Articles see 70 Cent. Law Jour., 294-296; 311-314.

If the bar as a whole appreciated the maxims that define and declare the position of the government in procedure; if every lawyer knew what it is that the state demands shall be shown by the record to constitute a *coram judice* proceeding; if he knew in other words what the parties may waive or stipulate away, and what waiver the state forbids, we would do away at one stroke with waiving pleadings, and the whole "theory of the case" doctrine. Then when we secured a judgment, it would be one based on the pleadings, which we are told are the foundation of the action; it would be a judgment that would stand on collateral attack; it would truly and in fact, put an end to the litigation, instead of as now, giving birth to more.

Of course, the matter may be looked at from many viewpoints. One is that the profession, to observe the forms of the law, must, somehow, be taught to understand the principles at the bottom of that endless discussion, so mystifying to lawyers, about the differences between the bill of exceptions on the one hand and the record on the other.

The true reason that forces our courts to ignore, for instance, matter in a bill of exceptions, which ought to appear in the record proper or common law or mandatory record, is that the latter record is the state's record, while the former record is the party's record. That is the difference in a nut-shell. It can be argued over pages. The state, for the benefit of the public at large, requires the record in every case to show certain facts. If these facts are shown, we have a *coram judice* proceeding, and the judgment is good on collateral attack. There need be no bill of exceptions at all—in most cases there is none. If these facts do not appear—if there are fatal defects on the face of the state's record, then the proceeding is *coram non judice*. The parties and the court cannot waive these requirements, because the state is a party in interest and does not consent. The state requires a record from which third parties can tell without opening the bill of exceptions (there may be none) what was decided.

Now suppose the petition states one cause of action, but at the trial the parties want to go into another, and the court lets them. Then judgment is entered on the new cause developed at the trial. There is no appeal and no bill of exceptions. Then we have the spectacle of pleadings setting up one cause of action, and a judgment on another. Is it good on collateral attack? No, decidedly not; the judgment is void. The whole thing has to be thrashed over again and new and conflicting rights determined. So it is apparent that the state's record cannot be waived. It must be observed, or chaos results. If the parties cannot depart from the state's record, in their bill of exceptions, neither can they bolster up the state's record by allegations in their record. The state's record speaks for itself and what ought to appear there must appear there and nowhere else.

The Supreme Court of Missouri has reiterated over and over again its position that the parties' record cannot be opened to help out the state's record. Milling Co., 222 Mo. 306. Judge Lamm, in Pennowfsky v. Coerver, 205 Mo. 135, makes an eloquent appeal to the profession, to learn this lesson, and concludes, almost plaintively, "So mote it be." The supreme court is unquestionably correct in its position, and would not be so often misunderstood had our lawyers been trained to see the state in procedure. See also Planing Mill Co. v. Chicago, Lead. Case, 2d, 3 Gr. & Rud.

The state's position can be seen from a consideration of the following two maxims of procedure:

1. *De non apparentibus et non existentibus eadem est ratio.*

2. *Omnia praesumuntur rite et sollenniter esse acta.*

There is a philosophy underlying the mandatory record, or record proper, and a philosophy underlying the statutory record, or bill of exceptions. We refer to the rules concerning error appearing in these two records, and the time and manner of at-

tacking it. Error, in matters of substance, appearing on the face of the mandatory record, may be taken advantage of by the general demurrer, and its correlatives, the motion in arrest, motion for judgment *non obstante veredicto,* the order of repleader, objections upon collateral attack, and when questions of *res adjudicata* are raised, by insisting that the necessary facts for the *coram judice* proceeding do not appear. All these objections to substantial defects in the mandatory record, while made at different stages of the proceeding, are directed against error of the same nature, appearing in the same record; for instance, that the complaint does not state facts constituting a cause of action. The different stages, therefore, at which these fundamental record defects may be raised, may be looked upon as a continuous chain or series of vertebrae, making up a harmonious articulated system of procedure, deriving its vital force from the maxim *De non apparentibus* and its cognate maxims. In other words, matters of substance, which fail to appear in the mandatory, or record proper —the state's record—are and must be treated in a constitutional government, as though they do not exist. The consequence is that such defects may be taken advantake of at any stage of the proceeding. At one stage the objection is called a motion or general demurrer, at another, motion in arrest, or *non obstante veredicto,* or repleader; or, after the direct proceeding is over, the objection may be raised by collateral attack on the fatally defective judgment, or may be urged in questions concerning its effect as *res adjudicata.* At whatever stage these objections to the record are raised, they are the same in essence—they amount in all cases to showing the court that the whole proceeding is affected with a fatal weakness through failure of the record to show those jurisdictional facts which the state requires it must show to constitute the *coram judice* proceeding. Underlying all these various modes of attacking a proceeding which is fatally defective, is the principle expressed in the maxim, *De non apparentibus, et de non existentibus, eadem est ratio*: what is not made to appear is to be treated as though it does not exist. This maxim is *the* great maxim of procedure—a maxim, unfortunately, which is not taught to our students, and not always enforced from the bench. It is, as W. T. Hughes expresses it, a "constitutional implication"—that is to say, a constitutional government must necessarily respect it. Legislatures may pass laws "abolishing" pleadings, but the courts govern and protect and must rule. Legislatures may pass statutes of jeofails, providing that when a verdict shall have been rendered, the judgment shall not be affected or impaired "for the want of any allegation or averment on account of which omission a demurrer could have been maintained." But the courts invariably annul such enactments, in so far as they attempt to cure errors of substance, that is, all errors reviewable upon *general* demurrer, or what amounts to the same thing, upon motion in arrest, and the other methods above pointed out, of calling the court's attention to the fact that there is nothing before it upon which to act. The courts, it is true, seldom by name quote the maxim *De non apparentibus.* There is a perceptible effort to ignore maxims, and to discover and set up "new" fundamental principles of law. But the human mind has perceptions of justice which will not be denied. It works, under its own laws, in obedience to these perceptions, and asserts them in the most unexpected ways. Even the judge who is most deferential to "our statute" (providing it violates no type on paper provision of a written constitution) will here and there turn upon it and denounce it as unjust, and void, without reference to any authority other than his own judicial perceptions of morality, convenience, necessity, reason—in short, of justice.

It is thus the maxim, *De non apparentibus,* operates, silently, but resistlessly, hidden, perhaps beneath pages of citations that would be unnecessary were our students trained to pronounce the magic name of the maxim.

"What does not judicially appear, is pre-

sumed not to exist." It is so simple, as to need no citation. For instance, the law presumes ownership from possession. Possession, like convenience, necessity and reason, is one of the big facts in the law. It is a basic, pivotal position. Therefore if A is in possession of property, B cannot recover it from him without stating (*De non apparentibus*) and proving (*Frustra probatur*) a cause of action. To let B take the property without stating, and then proving, a cause of action, would be to deprive A of his property without "due process of law." This is just as true in England, where they have no written constitution as it is here, where we have. The written constitution does not change the situation on this side of the Atlantic, in the slightest degree. It is an inherent perception of the justice of the thing that leads the white races to require a plaintiff to set out his cause of action where all may see it and know what it is. The difference is not one between a written constitution and an unwritten or prescriptive one. It is the difference between a constitutional government (written or unwritten) on the one hand, and a despotism, on the other. The Sultan of Turkey can take a man's property and life without the useless forms of procedure. They are too technical for him. The English and American governments have to observe these inconvenient "technicalities"—that is the difference between the two kinds of government—a difference fundamental enough. It is to be observed, too, that some of our leaders of the bar are doing their best to eliminate pleadings, and substitute the Turkish method of transferring property. Some of our tribunals have succeeded in getting away from the "technicalities" of pleadings, and have substituted the method of pleading for recovery of a horse, and allowing the pleader to recover on his "theory of the case" that what he really wants is not a horse, but a cow. The position of these courts seems to be that this is a speedy method of justice, and puts an end to litigation by letting the parties "fight it out on the *merits*" without bothering with form. But when some other court has the problem put up to it, on collateral attack, whether such a judgment for a cow instead of a horse is *coram non judice*, and void, then it begins to look doubtful whether the litigation is ended, or whether it is just beginning. "Consider the landmarks which thy fathers have set." It is a fairly safe proposition that the Roman knew how to govern, and therefore, how to keep the peace, and therefore how to end litigation. He had plenty of experience, and he has handed down to us no maxim that the writer has heard of, telling us that pleadings can safely be waived. It is also safe to say that minds like Bacon's, Mansfield's, Ellenborough's, Kent's, Marshall's and Story's understood the necessity of a record which would stand the tests of *res adjudicata* and of collateral attack. Neither do they countenance waiving the pleadings.

The conclusion would seem to be irresistible therefore that if A must state a cause of action before he will be allowed to take property away from B, no legislative or judicial short-cut can eliminate pleadings, or allow them to be waived. The answer sometimes is, yes, the thing cannot be done, but we are doing it. And, unfortunately, the answer is only too true. As Judge Dillon says, "Conditions are appalling," etc., etc.

But is this any excuse—any reason for not stopping our headlong course to destruction? Are we persistently and forever to refuse to teach our students the technics of our profession—its very groundwork—and continue to turn them loose from our schools, helpless as infants, with a disjointed knowledge of "substantive' law? Shall we continue to dismember an indivisible subject into "adjective" and "substantive" law; and then "teach" its "substantive" half? Is it not plain that our text books on "substantive" law—say contracts—are necessarily largely made up of "adjective" law, in which way for the most part the poor student has to get his "adjective" equipment? And what an equipment! There is scarcely a student out of our great colleges that understands the basic principles of procedure that, in the very nature,

and out of the heart of, things, create, control and mould the "substantive" law.

For instance, how many students are there who can stand an examination on the different functions,—different fields of operation—of the principle we have above discussed, *De non apparentibus* (what does not appear is presumed not to exist), on the one hand, and, on the other hand, of the maxim, *Omnia praesumuntur rite et solleniter esse acta* (all things are presumed to be regularly and rightly done)? It will be admitted that but few could stand the test, and yet an understanding of these two principles—a knowledge of when one operates, and when the other, is necessary—to take an illustration—to enable a lawyer to decide whether or not a proceeding is *coram judice* or *coram non judice*. To attempt to apply one principle where only the other can operate, might mean the loss of a great case and thousands of dollars—might mean the ruin of a promising career. Of course, the student cannot be blamed. It is simply that he is not taught fundamental principles. Nobody now living is to blame. Years ago, the profession got off the track, and our law teachers nowadays do not seem to know how it was brought about, or how to get back. At least, so far as has come to the writer's knowledge, the only book that grapples with these problems is W. T. Hughes' Grounds and Rudiments of Law.[1] This question is so important that it will be reserved for a subsequent article, in which Stephen on Pleading will be reviewed.

The fields of operation of these two principles are entirely distinct—they adjoin each other, but do not overlap. The maxim *De non apparentibus* applies to matters of substance which the state requires shall be affirmatively shown on the face of the record, or in the case of courts of superior jurisdiction, in the files. If one of these necessary matters is entirely absent, the judgment is *coram non judice*. It is a nullity. There is no time saved in allowing the parties litigant to reach a judgment, built upon such a record.[2]

Where, however, a jurisdictional fact, as for instance, valid service, the statement of a cause of action, jurisdiction of the subject matter, etc., is stated, but only in an inferential or indirect manner, so that the proceedings are formally defective, and open to objection, say, by special demurrer, motions to make more definite, or to strike out, etc., then there having been no such timely objection made, and there being some evidence in the trial court's record, of the existence of the disputed fact, the appellate court will apply the maxim, *Omnia praesumuntur* rite, and will uphold the judgment.

Thus, *De non apparentibus*, and its cognate maxims, are principles of strict construction, requiring the courts of a constitutional government to properly obtain jurisdiction of a valid cause of action, before they can take property from one man and give it to another.

Omnia praesumuntur, on the other hand, and its cognate maxims, like *consensus tollit errorem* (acquiescence in error obviates its effect); *ut res magis valeat quam pereat* (we should conserve rather than destroy) apply only to cases where all fundamental facts appear, so that there is something to build on, but where they do not appear in formal manner, or in proper place.

Many cases can be cited that have brought confusion into the law by failing to observe this distinction. An instance is Cooper v. Reynolds, 10 Wall. 308; 19 L. Ed. 931, by Justice Miller, Field, J., dissenting, where *omnia praesumuntur* was wrongly applied.

See the well considered case of Camp-

(1) See titles "De non apparentibus," Gr. & R. 926, and cases.

(2) Debile fundamentum, 2 Gr. & R. 471, and cases there cited.

bell v. Porter, 162 U. S. 478, Lead. Case 2, 3 Gr. & R. (Datum Posts), where the true *de non apparentibus* rule is laid down that objection may be raised at any stage of the proceeding that the court is without jurisdiction.

The limits of liberal construction, on the principle of *omnia praesumuntur* will be found laid down by Lord Ellenborough in Jackson v. Pesked, 1 Maule & Sel. 234, quoted Steph. Pl. 149; also by Story, J., in Dobson v. Campbell, L. C. 232a, 3 Gr. & Rud.

This limitation is well set out in Holland v. Daniel, 4 J. J. Marshall (Ky.) 20, approved and followed in Ropes v. Clay, 18 Mo. 383; 59 Am. Dec. 314n:

"It is a general rule of pleading established by the common law *because it is a dictate of common sense,* that after verdict it will be intended that everything was proved without proving which there could not have been a verdict for the party: Provided the declaration contains a general allegation of a cause of action, defective only in some circumstance of act which may be embraced by it, and *inferred from it.*"

Those words "inferred from it" mark the line between *de non apparentibus* and *omnia praesumuntur.* Where the necessary facts cannot be inferred, *omnia praesumuntur* has no application. The judgment is fatally defective. *De non apparentibus et de non existentibus, eadem est ratio* is the ruling principle. U. S. v. Cruikshank, L. C. 232, 3 Gr. and Rud.; Rushton v. Aspinall, Smith's Lead. Case, 8th Ed., Lead. Case 5, 3 Gr. & Rud. *et seq.*

EDWARD D'ARCY.

St. Louis.

(Note.—In my former letter, the case of Cape Girardeau v. R. R., 222 Mo. 461, 486-487, was omitted by the printer at the end of p. 313.—E. D.)

BIGAMY—EVIDENCE.

OLIVER v. STATE.

Court of Appeals of Georgia, April 19, 1910.

There is no error in charging the jury in a prosecution for bigamy that the fact of the first marriage might be established by sayings or declarations of the defendant proved to have been made by him during the time when he and the alleged first wife were living together as if they were husband and wife.

POWELL, J.: 1, 2. The indictment charged "A. D. Oliver, alias Le Roy C. Harding, alias Charles Blazer, alias John R. Davis, with the offense of bigamy, for that the said defendant on the 31st day of March in the year 1909, in the county aforesaid, did then and there, unlawfully and with force and arms, being lawfully married to one Mary Ella Hodges, did marry one Rosebud English, the said lawful wife, Mary Ella, being then and there alive, which fact was then and there known to and by said defendant." The defendant demurred on the ground that the indictment failed to set forth the time and place, when and where the defendant was married to Mary Ella Hodges; also because it failed to allege that he had not been divorced from Mary Ella Hodges at the time of the alleged second marriage. The first headnote is taken verbatim from the case of Murphy v. State, 122 Ga. 149, 50 S. E. 48. The ruling in the second headnote seems equally obvious. The indictment is substantially in the language of the statute. The grant of a divorce would be a matter of defense not necessary to be negatived in the indictment; if, indeed, the allegation that he was then and there lawfully married to the alleged first wife is not equivalent to an allegation that the marriage had not been dissolved by a divorce decree.

3. Defendant moved to continue because of the absence of one, White, whom he desired to use as a witness. It appeared that he wished to prove that White, as United States marshal, had measured him and had otherwise physically examined him, and that White's measurements did not correspond with certain Bertillon measurements which had been sent out from some source, probably the United States prison in Ohio, describing one Le Roy C. Harding, which the state contended was one of the aliases of the defendant. As the state was not relying on any Bertillon measurements to identify the prisoner, White's alleged testimony, when boiled down, would have been simply and

solely to the effect that the present prisoner did not correspond with what some outsider had said should be the correct description of him. It was not insisted that White had any knowledge of the correctness of the alleged Bertillon measurements, and, as his testimony would not have been admissible on the trial, there was no error in refusing a continuance for the purpose of getting it.

4. The state tendered in evidence a certified copy of a divorce proceeding brought in the Fulton superior court by Mary Ella Harding against Le Roy C. Harding, filed in office July 1, 1908, on which, on July 5, 1908, the defendant therein acknowledged service, and on which on September 26, 1908, through his attorneys, he filed an answer contesting the grounds of divorce; the first verdict on the proceedings having been rendered on March 29, 1909, and the second verdict on September 22, 1909. It was objected to on the ground that the defendant on trial had never been identified as Le Roy C. Harding; also, that his marriage to Mary Ella Harding had never been established; that the state could only prove his marriage to her by an eyewitness or by proper certificate from the state or place where the marriage ceremony was conducted. The defendant was identified by witnesses as being Le Roy C. Harding, and there were circumstances identifying him as the person mentioned in the divorce suit. The objection on the ground of lack of identification is, therefore, not meritorious. Nor was the other ground good. The very object of introducing the proceeding, including the defendant's answer, was to show the fact of the former marriage. It was a quasi admission of the former marriage, that he answered the divorce proceedings, without denying it, though contesting the plaintiff's right to a divorce on other grounds. It is well settled that, on a trial for bigamy, the fact of the first marriage may be established by the admissions of the accused. Murphy v. State, 122 Ga. 149 (3), 50 S. E. 48; McSein v. State, 120 Ga. 175 (1), 47 S. E. 544.

5. One of the exceptions is that the judge erred in charging the jury in effect that the fact that the marriage to the first wife might be proved by the sayings or declarations of the defendant made at a time when he and the alleged first wife were living and cohabiting together as if they were man and wife. There was no error in this. On a trial for bigamy the fact of the first marriage may be established by the admissions of the accused, even though not made pending cohabitation with the alleged first wife. Murphy v. State, supra; McSein v. State, 120 Ga. 175, 47 S. E. 544, and cases cited. Further, the declarations of the alleged husband and wife pending cohabitation are admissible as a part of the res gestae. Drawdy v. Hesters, 130 Ga. 161 (3), 165, 60 S. E. 451, 15 L. R. A. (N. S.) 190. It is not true, as contended by the plaintiff in error, that in a prosecution for bigamy the state must prove the alleged prior marriage by an eyewitness or by a certified copy or by proper certificate from the state or place where the marriage was conducted, and must further directly prove that the marriage was lawfully solemnized according to the laws of the state where it took place. While the state must prove a lawful prior marriage—lawful according to the law of the state where celebrated or contracted—yet the proof may be circumstantial, as well as direct, and, where a married state is proved, it will be presumed, until the contrary appears, that it was lawfully contracted, in accordance with the laws of the state where the marriage took place. Dale v. State, 88 Ga. 552 (2), 555, 15 S. E. 287. See, also, Murphy v. State, supra.

6. Exception is taken to certain rulings of the court as to the admission of testimony. It will be sufficient to say that, if the court committed any error at all in these rulings, it was against the state, and not against the accused. The testimony was in relation to the state's attempt to prove the first marriage by circumstances. It is plain that the court struck out all evidence of the former marriage resting on reputation only. His ruling in this respect seems to be justified by a statement in the case of Arnold v. State, 53 Ga. 574—a bare, unsupported dictum. However, in the case of Drawdy v. Hesters, supra, there is a well-reasoned and well-considered opinion holding, on a trial involving the issue of marriage vel non, evidence of the general repute in the neighborhood is admissible. Though the rulings complained of in the present case are not such as to confer upon us the jurisdiction to make an authoritative ruling upon the question as to whether general reputation in the community as to the first marriage is admissible in a bigamy case or not, and, therefore, the intimation which we have given to that effect is obiter, what we have said makes it plain that, if the court erred at all it was against the state, and not against the accused.

7. We have gone carefully through the brief of the evidence. It authorizes the verdict. The contention of the defendant was that he is not the same person as Le Roy C. Harding, who married Mary Ella Hodges; that it was his twin brother who married her. The brief of the evidence is hardly in

legal form for our consideration, for lack of condensation in compliance with the statute. Nevertheless, we have read it and considered it, and we are not prepared to say that the jury made any mistake in their finding that the man on trial is the same man that entered into both marriages.

8. The alleged newly discovered testimony was essentially cumulative. It related to the question of whether the present defendant or his twin brother went under the name of Le Roy C. Harding. Further, while there is an affidavit from the defendant stating that he could not obtain this testimony by diligence, yet he gives no reason why he could not have done so. If he had a twin brother who went under the name of Harding, he knew that fact before the trial as well as he did afterwards, and knew that the neighbors in the community where they had lived would probably testify to the facts.

Judgment affirmed.

NOTE.—*Sufficiency and Admissibility of Evidence to Establish Former Marriage.*—The old rule, if it ever obtained as a distinctly recognized rule in bigamy prosecutions, that there must be strict or formal proof of the prior marriage, seems to have little or no recognition in this country. The main conflict is as to the sufficiency of proof to support a conviction where admissions, conduct and reputation are relied on.

It has been held that admissions alone are not sufficient. State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241; State v. Cooper, 103 Mo. 266, 15 S. W. 327. And contrariwise Williams v. State, 54 Ala. 131, 25 Am. Rep. 665; State v. Wylie, 110 N. C. 500, 15 S. E. 5. Mere cohabitation seems by itself wholly insufficient. State v. Johnson, *supra;* State v. Cooper, *supra.* Likewise is this true as to mere reputation. Addison v. State, 34 Tex. Cr. 296, 30 S. W. 357.

The following case shows well the necessity of the concurrence of proof.

In People v. Hartman, 130 Cal. 487, 62 Pac. 823, the view of the court seems to be that general repute as to the relationship between defendants and an alleged former wife is admissible, but in itself not sufficient to sustain a conviction. The court's summary of what was shown in that case was that there was evidence showing cohabitation for many years, undivided general repute of marriage, admissions by defendant of marriage and some evidence to show the performance of an actual marriage ceremony. "These things, taken together, are ample to support" a finding of the fact of a former marriage.

And the following holds the reverse: In State v. Pendleton, 67 Kan. 180, 72 Pac. 527, it was said: "In the present case there was no direct evidence of the first marriage or of the actual fact of cohabitation, the prosecution relying wholly upon testimony as to admissions and reputation and circumstantial evidence. In several states the rule has been adopted that the first marriage must be established by positive proof of the very fact of marriage, as distinguished from a marriage that may be inferred from circumstances." This theory the court rejects. The court also refuses to declare that in the absence of such direct proof there must be proof to show "the three elements of admissions, cohabitation and reputation," and it refuses to subscribe to this rule, but holds that: "There is nothing peculiar about an allegation of this kind, requiring unusual treatment, but it may be proved by any competent evidence, direct or circumstantial, the same as any other fact." It is conceded, however, there are many well-considered decisions to sustain the view that was rejected. The remaining cases are set forth sufficiently to show how they stand.

In State v. Goulden, 134 N. C. 743, 47 S. E. 450, the only evidence of the former marriage seems, as the case is reported, to have been that about three weeks before this second marriage defendant was charged with the existence of his first wife and he replied: "I wish I could hear she was dead so I could be a free man." This was held admissible and a conviction was sustained.

In State v. Gallagher, 20 R. I. 266, 38 Atl. 655, it was said to be well settled in that state that "admissions of the accused are competent evidence of the fact of marriage. Though there are denials of this doctrine, yet it is sustained by the great body of the cases, English and American. See the numerous cases in 1 Bish. Mar Div. and Sep., sec. 1058, note."

This case cites State v. Medbury, 8 R. I. 543, where the question is very elaborately treated, and it was argued that cases for criminal conversation, where the fact of marriage must be proved directly, should be distinguished from prosecutions for bigamy.

In Crane v. State, 94 Tenn. (10 Pickle) 86, 28 S. W. 317, the opinion reviews cases to the effect that in this country there should be a modification of the rule that a valid marriage should be strictly proved, because of the migratory habits of its people and its large infusion of a foreign element makes this often impossible, and going upon this theory it was held that a statute of that state providing among other things that a "public acknowledgment of the party charged" with bigamy, shall be competent evidence as to both marriages, does not mean an acknowledgment before a court or other public tribunal, but it includes an acknowledgment by confession or conduct in the presence of one or more individuals. It need not be in the shape of a public avowal, made in the courts, or in the market place or from a house-top, "but can be as well by acts and conduct recognizing the marriage, or by oral statements to third persons."

The following case shows an opening of the door, under circumstances, in respect to admissions not made to third persons:

In Caldwell v. State, 146 Ala. 141, 41 So. 473, the question was as to the admissibility of certain letters written by defendant to one whom he addressed as his wife and subscribed himself as her husband, and these were held competent as supplementing evidence of a witness to the ceremony and to their living together as husband and wife. The objection that this was "to allow proof of confidential and private communications between husband and wife, not intended to be made public," was overruled. It was said "there was no fact of a private or confidential nature disclosed by the letters, and hence under the cir-

cumstances of this case * * * we are unable to reach the conclusion that any public policy would be infringed or the peace of the family disturbed" by their admission.

In People v. Penniman, 72 Mich. 154, 40 N. W. 425, Judge Campbell shows that eye-witnesses are preferred to documentary evidence because by the latter "there is always possibility of mistaken identity," but there is nothing said about other sorts of proof.

It seems that the later cases generally reject the absolute necessity of positive proof of the very fact of marriage. Statutes, however, in many states provide in regard to these matters, and we have seen in Crane v. State, *supra*, how the latter view may affect their construction.

C.

JETSAM AND FLOTSAM.

SMALL HOLDINGS ACT AND COURTS OF JUSTICE.

In a recent address the Lord Chief Justice called attention to the tendency of present day legislation to confer duties of a judicial nature on various government departments, to the exclusion of courts of justice. The movement in this direction has been going on for some years; but although unimportant in the early stages, it is now assuming such proportions that the time has arrived when the whole principle deserves serious consideration. If this method of procedure has been introduced because of the expense, or because of the fact that the courts are already over-crowded with work, then these evils must be remedied, rather than that persons affected should not have recourse to the courts of justice.

We do not wish to suggest that the government departments have not, up to the present, discharged these duties in a careful and satisfactory manner. They have probably come to a wise decision in most instances; but the falseness of the position arises from the fact that they lack the independence which is the finest characteristic of a judge. They may be, perhaps, unconsciously affected by party spirit. They are not required to give reasons for their actions. Their decisions form no binding precedents, and there are no appeals. There may be a local inquiry before the decision is given, but this inquiry is not held by the person who actually decides, and, in fact, his view may be, and sometimes is, overruled by persons in authority over him.

These are objections to the system when everyone is trying conscientiously and impartially to perform his duties. Suppose we had at any time at the head of a government department a man or men who allowed party spirit to sway their decision, or men who were not conscientious, men who had selfish and personal ends to serve. Could their decisions be tolerated for one moment? Could such men be allowed to deprive another citizen of his rights or property, and that citizen have no appeal, and no power to come to the king's courts for protection? Yet such is one of the possible results of this new form of legislation.

In some instances the courts might intervene. If a government department exceeded its jurisdiction, or if a person who had judicial functions to perform was too much affected by interest to give an unbiased decision, possibly a remedy might be forthcoming, although in the latter case the evidence would be difficult to provide. A form of clause has, however, been adopted, which even makes this remedy doubtful, and we must confess that this method of legislation fills us with grave misgiving. England has been credited with the fairest and most independent judicial staff in the world, and Englishmen may well feel jealous of their rights of appealing to it.

From this point of view the case of Ex parte Ringer (1909), 73 J. P. N. 360, 25 T. L. R. 718, deserves attention. To quote from the judgment of Jelf, J., "This case presented an illustration of the length to which parliament had the right to go in ousting the powers and jurisdiction of the courts of law. If a majority in parliament were successful in passing an act of parliament which had that effect, then the jurisdiction of the courts of law in matters in which some people might think it was desirable that even government departments should be under the control of the courts, was nevertheless ousted, and the court had no power to interfere with the decision of the department."

The case itself arose out of proceedings to take land compulsory for the purposes of the Small Holdings and Allotments Act, 1908, 8 Edw. 7, c. 36. The procedure is governed by sections 38 to 43 and schedule I. When it is desired to take land compulsory, the council (in this case the Norfolk county council) are empowered to make an order putting in force, as respects the land specified in the order, the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement. This order requires to be confirmed by the board of agriculture and fisheries, and if there are objections the board must cause a public inquiry to be held in the locality, and before confirming the order must consider the report of the person who held the inquiry, and all objections made thereat. The board may alter the order as they think fit, but once it is confirmed, it becomes final, and has effect as if enacted in the Small Holdings and Allotments Act. But, further, clause 39 (3) of that act provides that "the confirmation by the board shall be conclusive evidence that the requirements of this act have been complied with, and that the order has been duly made and is within the powers of this act." It seems, therefore to follow that if the board confirmed the order without considering the report of the person who held the inquiry, or sanctioned the taking of more land than was required, or of land to be used for some wholly different purpose, or if they acted in a partial or impartial manner, yet, nevertheless, the order is to be deemed duly made, and to be within the powers of the act.

The case in question did not go so far as to allege any such improper act. In section 41 of the act there is, however, a provision that the board, in confirming the order, must, so far as practicable, avoid taking an undue or inconvenient quantity of land from any one owner, and for that purpose, where part only of a holding is taken, the board must take into consideration the size and character of the existing

agricultural buildings not proposed to be taken, which were used in connection with the holding, and the quantity and nature of the land available for occupation therewith.

The court found themselves powerless in the matter. They considered that the provision referred to above was quite conclusive of the matter. The section gave to an order confirmed by a public department the absolute finality and effect of an act of parliament, and the court could no more set aside such an order than they could set aside an act of parliament. It was said by counsel in moving for the rule that the farming interest in Norfolk had been so hard hit by the act that they desired to bring this matter before the court in order that they might be assured that the act was being properly administered. The answer they have received is that the courts have been rendered powerless by the act. Possibly, when the application was made they did not expect very much more. They have, however, obtained a judicial interpretation of this clause, and they have at least succeeded in calling the attention of the country to a form of legislation which may have some merits, but which is nevertheless contrary to the true principles of government, and which, in the hands of unscrupulous persons, might be made a terrible weapon of injustice.

The case we have referred to is not a solitary instance of the courts to interfere with a semi-judicial decision by a government department. Thus, in R. v. The Local Government Board (1908), 72 J. P. 211, a number of the Metropolitan borough councils desired to question a decision of the defendant board, on the ground that the board had wrongly interpreted a section of the London Government Act, 1899. Here, again, the court held that they were powerless to assist the applicant.—Justice of the Peace.

BOOK REVIEWS.

SUTHERLAND ON CODE PLEADING PRACTICE AND FORMS.

Mr. William A. Sutherland, of the California Bar, has proposed a work in four volumes showing the code system, particularly as exemplified in legislation of the Pacific slope, of which the two first volumes have appeared.

There is set forth substantial law with every proposition in the text based on authority cited thereto. In addition there are given and to be given in the completed work more than nineteen hundred forms.

The author appreciates that citation of authority could be extended almost indefinitely in a work of this character and in the preface it is stated that "merely cumulative authorities have been omitted and cases have multiplied only where they are of illustrative value."

The volumes will be of practical use in all code states, as the industry of the author in his compilation of decided points, and the arrangement of this for practical use appears to be very remarkable.

The author says the series will embrace no fewer than 1,900 forms "the great majority of which have been judicially approved."

This series cannot but be of very great utility to the practitioner and the case law needed is put practically at one's elbow in double citations of original reports and those of the West system.

In addition to citation of judicial authority there is much reference to code sections, the substance of the statutory rule being given in the text.

While, noticeably, the bulk of the cases cited are of the states above mentioned, there is a considerable part from elsewhere. Thus we see cases from Alabama, Kansas, New York, Iowa, Missouri, Massachusetts and various other states.

It is conceivable, that a treatise of this nature might command an almost infinite multiplication of authority and, therefore, the author tells us that "merely cumulative authorities have been omitted, and cases have been multiplied only when they are of considerable illustrative value."

The work is bound in law buckram, the paper of a most excellent quality, the text in clear print agreeable to the eye and issues from the publishing house of Bancroft-Whitney Company, San Francisco, 1910.

HUMOR OF THE LAW.

A long-winded, prosy counselor was arguing a technical case recently before one of the judges of the superior court. He had drifted along in such a desultory way that it was hard to keep track of what he was trying to present and the judge had just vented a very suggestive yawn.

"I sincerely trust that I am not unduly trespassing on the time of this court," said the lawyer with a suspicion of sarcasm in his voice.

"There is some difference," the judge quietly observed, "between trespassing on time and encroaching on eternity."—Philadelphia Ledger.

"What kind of a career have you mapped out for your boy Josh?"

"I'm going to make a lawyer of him,' answered Farmer Corntossel. He's got an unconquerable fancy fur tendin' to other folks' business, an' he might as well git paid for it." —Washington Star.

Old Lawyer (to young partner)—Did you draw up old Moneybag's will?"

Young Partner—Yes, sir, and so tight that all the relatives in the world cannot break it.

Old Lawyer (with some disgust)—The next time there is a will to be drawn up I'll do it myself.

Judge—Then, when your wife seized the weapon you ran from the house?

Plaintiff—Yes, sir.

Judge—But she might not have used it.

Plaintiff—True, your Honor. Maybe she picked up the flatiron just to smooth things over.—Daily Socialist.

Opposing Counsel—"A chap told me this morning that I looked the image of you." "Where is the idiot? I'll pound the life out of him." "Too late. I killed him."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adjoining Landowners**—Injuries From Blasting.—Negligence need not be shown, to recover for damages to adjoining property from blasting and other operations in the construction of a railroad tunnel, causing concussion, though no matter was thrown on the adjoining land.—Hickory v. McCabe & Bihler, R. I., 75 Atl. 404.

2.——Negligence.—In case of injury to adjoining property by the falling of a wall, the burden is on the owner to exculpate himself.—Teepen v. Taylor, Mo., 124 S. W. 1062.

3. **Action**—Joinder.—Claims against an executor in his representative capacity and claims against him as an individual cannot be joined in the same action.—Mailly v. Elliott, N. J., 75 Atl. 472.

4. **Appeal and Error**—Appealable Orders.—An apppeal from a non-suit before final judgment will not lie.—Barker v. Thomas, S. C., 67 S. E. 1.

5. **Attorney and Client**—Effect of Compromise of Action.—The client, as long as he acts in good faith, without intent to defraud, held to have the right to compromise and settle his cause of action with or without the consent of his lawyers.—Hurr v. Metropolitan St. Ry. Co., Mo., 124 S. W. 1057.

6.——Knowledge of Attorney.—That a grantee directed the grantor's attorney to examine the title and execute the conveyances did not charge the grantee with the attorney's knowledge of the grantor's fraudulent intent.—Rogers v. Driscoll, Tex., 125 S. W. 599.

7. **Bail**—Custody of Accused Pending Rehearing.—A defendant convicted of a criminal offense, and whose conviction has been affirmed by the Circuit Court of Appeals while he was at large on bail, will not be remanded to custody pending a motion for rehearing unless some unusual reason is shown why he is not likely to remain within the jurisdiction.—Walsh v. United States, U. S. C. C. of App., Seventh Circuit, 174 Fed. 621.

8. **Bankruptcy**—Appointment of Receiver.—An ex parte order appointing a receiver for an alleged bankrupt held erroneous.—In re Oakland Lumber Co., U. S. C. C. of App., Second Circuit, 174 Fed. 634.

9.——Appointment of Trustee.—On the appointment of a trustee in bankruptcy, his title relates back to the date of adjudication.—In re Frazin & Oppenheim, U. S. D. C., S. D. N. Y., 174 Fed. 713.

10.——Discharge.—A discharge of a judgment debtor in bankruptcy held to have released the principal and sureties on his six months bond to release him from arrest on a judgment provable in bankruptcy.—Almon H. Fogg Co. v. Bartlett, Me., 75 Atl. 380.

11.——Involuntary Proceedings.—An involuntary bankrupt is entitled as of right to a jury trial only as to his insolvency and acts of bankruptcy alleged.—Carpenter v. Cudd, U. S. C. C. of App., Fourth Circuit, 174 Fed. 603.

12.——Landlord and Tenant.—A landlord, having accepted rent from the trustee, waived his right to re-enter because of the lessee's bankruptcy, authorizing a sale of the lease by the trustee.—In re Frazin & Oppenheim, U. S. D. C., S. D. N. Y., 174 Fed. 713.

13.——Member of Stock Exchange.—On the bankruptcy of a member of a stock exchange, the proceeds of the sale of his seat and of closed transactions pass to his trustee, subject to be applied in accordance with the rules of the exchange as against general creditors.—In re Gregory, U. S. C. C. of App., Second Circuit, 174 Fed. 629.

14.——Rights of Trustee.—A trustee in bankruptcy can recover a fund held in trust for the bankrupt under a passive trust without protecting the trustee against liability on notes which he had indorsed for the bankrupt.—Wallace v. Everett, Ky., 125 S. W. 745.

15.——Wage-Earners.—The president of a corporation drawing a salary of $900 a year, held not a wage-earner.—Carpenter v. Cudd, U. S. C. C. of App., Fourth Circuit, 174 Fed. 603.

16. **Banks and Banking**—Agreement Not to Negotiate Note.—A negotiable instrument cannot be affected in the hands of an innocent purchaser for value by a contemporaneous oral agreement between the original parties that it should not be negotiated.—Bothell v. Fletcher & Stobaugh, Ark., 125 S. W. 645.

17. **Benefit Societies**—Beneficiaries.—The beneficiary under a life policy, having murdered in-

sured, held to have no right of recovery on policy.—Anderson v. Life Ins. Co. of Virginia, N. C., 67 S. E. 53.

18. **Bills and Notes**—Consideration.—The consideration of promissory note may as between parties be attacked, and a total failure of consideration will bar a recovery thereon.—Pyle v. Gallaher, Del., 75 Atl. 373.

19.——Purchase After Maturity.—The purchaser of a note after maturity from an agent of the maker, who had paid it for the maker, and reissued it without authority, held to have no remedy against the maker.—Thiel v. Butker, La., 51 So. 500.

20. **Boundaries**—Beginning Corner.—The beginning corner is of no higher dignity than any other corner of a survey of land.—Ramseaur v. Ball, Tex., 125 S. W. 590.

21. **Breach of Marriage Promise**—Renunciation of Contract.—An offer of performance by a person renouncing a contract of marriage, after the other party has brought suit for breach thereof, held not to bar recovery.—Connolly v. Bollinger, W. Va., 67 S. E. 71.

22. **Brokers**—Contract.—While a broker who voluntarily brings a purchaser to the owner of land is not entitled to commissions, if he endeavored to sell it with the owner's knowledge, there is a sufficient consideration for the latter's promise to pay for the broker's services when a purchaser is procured.—Dockery v. Maple, Tex., 125 S. W. 631.

23. **Cancellation of Instruments**—Restoration of Consideration.—On the cancellation of a deed by a married woman on the ground that her husband did not join therein, the grantor must restore the consideration, and the grantee has a lien for such amount.—Mays v. Pelly, Ky., 125 S. W. 713.

24. **Carriers**—Bill of Lading.—Where the consignee in a bill of lading indorsed thereon a direction to deliver to the third person, the latter held entitled to sue for damages for subsequent delay.—Moore v. Atlantic Coast Line R. Co., S. C., 67 S. E. 11.

25.——Carriage of Goods.—A railroad's liability as a carrier ceases and becomes that of warehouseman only, when the consignee has had a reasonable time within which to remove the goods after their readiness for delivery at destination.—Knight v. Southern R. Co., S. C., 67 S. E. 16.

26.——Estoppel.—A shipper held not estopped to claim that transfer of bill of lading passed only the transferror's title.—Webster v. Baer, Mo., 125 S. W. 815.

27.——Injury to Guest in Bus.—A person invited by defendant's bus driver to ride without fare held entitled to the same rights as a passenger.—Palmer Transfer Co. v. Smith, Ky., 125 S. W. 725.

28.——Limitation of Liability.—As to interstate shipments, a common carrier cannot contract for exemption from liability for injuries resulting from his own negligence.—Gilliland & Gaffney v. Southern Ry. Co., S. C., 67 S. E. 20.

29.——Limitation of Liability.—Where a shipper had no opportunity to ship under any other than a contract of limited liability, he was entitled to recover for the loss of the goods, regardless of the contract.—Southern Express Co. v. R. H. Meyer Co., Ark., 125 S. W. 642.

30.——Negligence.—A common carrier of passengers is not an insurer of their safety, but is only liable for injuries caused by its negligence.—Eaton v. Wilmington City Ry. Co., Del., 75 Atl. 369.

31.——Passengers.—Plaintiff held a passenger while on defendant's platform at a junction, and defendant liable for damages caused by the misdirection of its porter as to the train plaintiff should have taken.—Bullock v. Atlantic Coast Line R. Co., N. C., 67 S. E. 60.

32. **Carriers of Goods**—Limitation of Liability.—A contract for an interstate shipment of goods, limiting the liability of the carrier to loss occurring while the goods were in its possession and the damages to a stated amount, was void in these particulars and cannot affect the shipper's right to recover for their loss. —Southern Express Co. v. R. H. Mayer Co., Ark., 125 S. W. 642.

33. **Chattel Mortgages**—Defective Description. —A defect in the description of the personalty in a mortgage is cured by the subsequent delivery of the personalty to the mortgagee as against the general creditors of the mortgagor. —Cuddy v. Becker, Mayer & Co., Iowa, 124 N. W. 1071.

34.——Description of Mortgaged Chattels.—A description of the mortgaged chattels as "two yoke of oxen, known as the J. L. Kirk oxen," was sufficient.—Reeves v. H. C. Allgood & Co., Ga., 67 S. E. 82.

35.——Mistake in Maker's Name.—An error in the name of the mortgagor appearing in the body of a chattel mortgage held not to invalidate it.—Payne v. King, Mo., 124 S. W. 1066.

36. **Constitutional Law**—Determination of Constitutional Questions.—The court will not consider an objection to the constitutionality of a statute made by a party whose rights it does not affect and who has no interest in defeating it.—Blais v. Franklin, R. I., 75 Atl. 399.

37.——Legislative Powers.—A statute in the nature of a supplemental charter, enacted to take effect on its adoption by the governing body of the municipality, is not a constitutionally enacted law.—Booth v. McGuinness, N. J., 75 Atl. 455.

38.——Right to Trial by Jury.—A summary trial without a jury for violation of a city ordinance, and a sentence to pay a $500 fine and to work upon the streets for 30 days, held not violative of Const. art. 1, sec. 1, par. 3, nor of Const. U. S. Amend. 14, sec. 1.—Loeb v. Jennings, Ga., 67 S. E. 101.

39. **Contracts**—Credit Insurance.—As between the parties to a contract it is no objection that it was postdated.—American Credit Indemnity Co. of New York v. Hecht & Co., Ky., 125 S. W. 697.

40. **Corporations**—Criminal Responsibility.— A corporation in the hands of a receiver appointed by a federal court held not criminally liable for the acts of the agents of the receiver obstructing a public road contrary to a state statute.—State v. Norfolk & S. Ry. Co., N. C., 67 S. E. 42.

41.——Interest in Profits.—A shareholder in a corporation has no property interest in the profits of the business carried on by the corporation until a dividend has been declared out of such profits.—Pyle v. Gallaher, Del., 75 Atl. 373.

42. **Courts**—Concurrent Jurisdiction.—The state court and United States court held to have concurrent jurisdiction of an action for injury

or death, under the federal employers liability act.—Lemon's Adm'r v. Louisville & N. R. Co., Ky., 125 S. W. 701.

43. **Criminal Trial**—Venue a Jurisdictional Fact.—Venue must be proved by the prosecution as a part of a general case.—Minor v. City of Atlanta, Ga., 67 S. E. 108.

44. **Damages**—Action for Injuries.—In an action for injuries to a passenger by the sudden starting of the car as she was alighting, held proper to refuse an instruction that there was no evidence to support a verdict for punitive damages.—Best v. Columbia Electric St. Ry., Light & Power Co., S. C., 67 S. E. 1.

45. **Death**—Burden of Showing Cause.—Where decedent's death results from one of two causes for only one of which defendant is liable, plaintiff must show with reasonable certainty that the cause for which defendant is liable produced the result.—Kelly v. Union Pac. Ry. Co., Mo., 125 S. W. 818.

46. **Dedication**—Intention to Dedicate.—The marking of vacant lots on a plan for a park system dedicated to the public as "15x60" held not to imply dedication thereof.—Brown v. Dickey, Me., 75 Atl. 382.

47. **Detinue**—Verdict.—Where a verdict for plaintiff in detinue describes the property merely as "the property described in his declaration," a sufficient description in the declaration will supply the lack of it in the verdict.—West Virginia Timber Co. v. Ferrell, W. Va., 67 S. E. 69.

48. **Discovery**—Physical Examination.—The court has no power to require a plaintiff, suing for personal injuries, to submit to a physical examination by defendant's physicians or by physicians appointed by the court.—Best v. Columbia Electric St. Ry., Light & Power Co., S. C., 67 S. E. 1.

49. **Divorce**—Liability for Wife's Attorney's Fees.—The mere filing of a motion by a husband suing for divorce, to dismiss the action, does not destroy the claim of the wife for alimony and attorney's fees.—Varn v. Varn, Tex., 125 S. W. 639.

50. **Eminent Domain**—Right of Exercise.—Eminent domain rights are attributes of sovereignty, to be exercised by the state with great caution and only in case of public necessity.—Wise v. Yazoo City, Miss., 51 So. 453.

51. **Estoppel**—By Deed.—A mortgagor in possession under deed of warranty, where no fraud or eviction is shown, cannot defend foreclosure of purchase money mortgage by setting up outstanding title.—R. J. & B. F. Camp Lumber Co. v. State Sav. Bank, Fla., 51 So. 543.

52.——Persons Affected.—An estoppel as against a third person on account of misrepresentation or the like will operate against his heirs.—Thornton v. Ferguson, Ga., 67 S. E. 97.

53. **Evidence**—Books of Account.—The results of voluminous facts or of the examination of many books and papers may be proved by the person who made the examination.—Washington Horse Exch. v. Wilson & McCoy, S. C., 67 S. E. 35.

54.——Consideration.—Parol evidence is always admissible between the parties to show want of consideration.—Kessler v. Clayes, Mo., 125 S. W. 799.

55.——Declarations as to Family History.—Declarations of deceased members of a family regarding its history are admissible in evidence.—Flores v. Hovel, Tex., 125 S. W. 606.

56.——Judicial Notice.—The court takes judicial notice of the custom that authority to a broker to sell land carries with it the obligation to furnish an abstract of title.—Watkins v. Thomas, Mo., 124 S. W. 1063.

57.——Ledger Entries.—An entry in a ledger, made by one of two defendants, was an original entry as to him, and admissible in evidence as against him.—Becker v. Donalson, Ga., 67 S. E. 92.

58.——Parol Evidence.—Where a note imports a legal obligation with certainty, parol evidence is inadmissible to destroy its obligation and show that it was in fact a mere recital.—Kessler v. Clayes, Mo., 125 S. W. 799.

59.——Parties to Deed.—Though grantees in a deed are described therein as husband and wife, it may be shown by parol that such is not the case.—Hubatka v. Meyerhofer, N. J., 75 Atl. 454.

60. **Executors and Administrators**—Collateral Attack.—An order granting administration and directing the sale of real estate to pay debts should be sustained on collateral attack, unless the record affirmatively shows that jurisdiction did not exist.—Salas v. Mundy, Tex., 125 S. W. 633.

61.——Foreclosure by Administrator.—Where an administrator, acting as such and also as agent for a third party, bought a note and mortgage given by intestate under a foreclosure, whereof the land was sold to such third party for an inadequate price, the deed held not to pass title as against the heirs.—Morton v. Blades Lumber Co., N. C., 67 S. E. 67.

62.——Settlement of Claims.—A settlement by an administrator of his claim for negligent death of decedent, made in fraud of the rights of the beneficiaries, held subject to be opened at the instance of the beneficiaries.—Leach v. Owensboro City Ry. Co., Ky., 125 S. W. 708.

63. **Fire Insurance**—State Regulation.—The state has an unquestioned right to regulate the business of insurance.—State v. Alley, Miss., 51 So. 467.

64. **Frauds, Statute of**—Oral Agreement to Act as Agent.—An oral agreement to act as agent in buying land is valid and not within statute of frauds.—Conklin v. Kruger, N. J., 75 Atl. 436.

65. **Fraudulent Conveyances**—Preferences.—It is the right of an individual who is failing or insolvent to prefer one of his creditors.—Atlantic Refining Co. v. Stokes, N. J., 75 Atl. 445.

66.——Preferences.—An insolvent debtor may pay certain of his creditors in full, and leave others unpaid, and may sell property for such purpose.—Rogers v. Driscoll, Tex., 125 S. W. 599.

67. **Homestead**—Transfer.—Where a wife does not join in the execution of a deed to a homestead, under Act March 18, 1887 (Acts 1887, p. 90), the deed is void and the grantee acquires no title.—Mason v. Dierks Lumber & Coal Co., Ark., 125 S. W. 656.

68. **Husband and Wife**—Deed by Wife.—A deed by a married woman of her separate property in which her husband did not join being void, she is not bound by any statement that she will never question its validity.—Mays v. Pelly, Ky., 125 S. W. 713.

69.——Estate by Entireties.—To create an estate by entireties, the grantees must be husband and wife at the the time of the convey-

ance.—Hubatka v. Meyerhofer, N. J., 75 Atl. 454.

70. **Indemnity Insurance**—Authority of Agent. —A provision of a policy that no agent should have power to waive any of its provisions held waived by the company's failure to repudiate a policy postdated by the agent.—American Credit Indemnity Co. of New York v. Hecht & Co., Ky., 125 S. W. 697.

71.——Renewals.—Renewal policy of credit insurance held to cover losses on goods sold within the time covered by the preceding policy.—American Credit Indemnity Co. of New York v. Hecht & Co., Ky., 125 S. W. 697.

72. **Injunction**—Wrongful Issuance.—In an action on an injunction bond, plaintiff's damages are limited to such as followed as the natural and proximate consequence of issuing the injunction.—Phoenix Pad Co. v. United States, Md., 75 Atl. 394.

73. **Interstate Commerce**—What Law Governs. —To the extent that U. S. Comp. St. Supp. 1909, pp. 1178, 1179, secs. 1, 2, fixes the duties and liabilities of the shipper and carrier in interstate transportation, it is controlling and displaces any state law on the subject.—Gilliland & Gaffney v. Southern Ry. Co., S. C., 67 S. E. 20.

74. **Intoxicating Liquors**—Sale by Druggists. —A druggist charged with selling intoxicating liquors without a prescription must, to escape a conviction, show that the prescription relied on was a legal one.—State v. Clinkenbeard, Mo., 125 S. W. 827.

75. **Judgment**—Amendment.—A party in court with actual knowledge of an amendment of the judgment, may not complain because of the absence of a formal motion therefor, and the service of notice on him.—Varn v. Varn, Tex., 125 S. W. 639.

76.——Default.—A default judgment in an action against a railroad for negligently killing a horse cannot be rendered, without first awarding a writ of inquiry to assess its value.—Mississippi Cent. R. Co. v. Crawford, Miss., 51 So. 466.

77. **Landlord and Tenant**—Ninety-nine Year Leases.—Leases for 99 years are valid both at the civil and common law.—State v. Board of Adm'rs of Tulane Education Fund, La., 51 So. 483.

78. **Life Insurance**—Action on Policy.—A person who had paid premiums on life policy and funeral expenses of insured held not entitled to sue on the policy, in which no beneficiary was named.—Marzulli v. Metropolitan Life Ins. Co., N. J., 75 Atl. 473.

79.——Non-Payment of Premium.—An agent of insurer without authority to make a new contract of insurance held without authority to waive a forfeiture for non-payment of a premium.—Crook v. New York Life Ins. Co., Md., 75 Atl. 388.

80. **Limitation of Actions**—Accrual of Cause of Action.—The statute of limitation does not begin to run until the right to sue has accrued. Pitman v. Ball, Mo., 124 S. W. 1082.

81.——Non-Resident Corporations.—Ownership of property does not make a non-resident corporation a resident so as to put in force the statute of limitations which is suspended by Revisal 1905, sec. 366, as to non-residents, nor does the appointmeint of a local agent on whom process can be served.—Vollvar v. Richmond Cedar Works, N. C., 67 S. E. 42.

82. **Master and Servant**—Assumption of Risk. —A servant over 14 years of age is presumptively endowed with sufficient intelligence to perform the work assigned to him, but the presumption may be rebutted.—Burnett v. Roanoke Mills Co., N. C., 67 S. E. 30.

83.——Contributory Negligence.—Where there was a safe method of unchoking a machine in a cotton mill, and the servant, contrary to the express instructions of the master, attempted to do so in an unsafe way and was injured, the master was not liable therefor.—Burnett v. Roanoke Mills Co., N. C., 67 S. E. 30.

84.——Contributory Negligence.—A servant, injured through the concurring negligence of himself and that of a fellow servant, cannot recover.—McMurray v. St. Louis, I. M. & S. Ry. Co., Mo., 125 S. W. 751.

85.——Discharge of Servant.—A traveling salesman's refusal to obey an unreasonable instruction as to where he should work, under the terms imposed by his employer, held not a voluntary quitting of his employment, or ground for his discharge.—Asinof v. Lasker, 121 N. Y. Supp. 375.

86.——Fellow Servant.—A master is liable for injuries to an inexperienced servant in consequence of his attempt to obey a negligent order of one in authority.—Holton v. John L. Roper Lumber Co., N. C., 67 S. E. 54.

87.——Safe Place to Work.—The rule requiring the master to use ordinary care to furnish a reasonably safe place for work is subject to the exception that the servant assumes risks resulting from changes made in the place of work by him in the ordinary progress of the work.—Wight v. Cumberland Telephone & Telegraph Co., Ky., 125 S. W. 718.

88.——Violation of Contract.—Where a person contracted to labor in consideration of advances already made, that he quit the service held not of itself to raise a presumption that he intended to defraud when he obtained the advances.—Raffield v. State, Ga., 67 S. E. 109.

89. **Mortgages**—Liens.—A mortgage of property to be acquired in the future is void against the mortgagee's creditors or purchasers for value.—Wender Blue Gem Coal Co. v. Louisville Property Co., Ky., 125 S. W. 732.

90. **Municipal Corporations** — Intoxicating Liquors.—All who violate or assist in violating a municipal ordinance, directly or accessorily, are equally guilty as principals.—Stradley v. City of Atlanta, Ga., 67 S. E. 107.

91.——Surface Waters.—A city may not collect surface water into drains or sewers, and discharge it in unusual quantities onto private property.—Lewis v. City of Springfield, Mo., 125 S. W. 824.

92.——Use of Highway.—The more dangerous the character of a vehicle used, and the greater its liability to do injury to others, the greater the degree of care and caution required in its use and operation on a street.—Cecchi v. Lindsay, Del., 75 Atl. 376.

93. **Negligence**—Children.—A child's conduct, considered from the standpoint of the ordinary child, may be contributorily negligent as a matter of law.—Henry v. Missouri Pac. Ry. Co., Mo., 125 S. W. 794.

94.——Contributory Negligence.—There is a

presumption that a child under seven years of age is not guilty of contributory negligence. —Baker v. Public Service Ry. Co., N. J., 75 Atl. 441.

95. **Partition**—Special Interests.—A guardian having a special interest in the ward's property held entitled to purchase it at a partition sale.—Credle v. Baugham, N. C., 67 S. E. 46.

96. **Partnership**—Estoppel.—One who was never a partner in a business conducted in a firm name embracing his name, permitting such use of his name and representing himself to be a partner, held liable by estoppel as a partner.—Cirella v. Palmieri, 121 N. Y. Supp. 321.

97.——Existence.—Whether the facts constitute a partnership relation is a question of law; but whether the essentials of a partnership exist is a question of fact.—Snowden v. Cunningham, Fla., 51 So. 543.

98.——Loan of Money to Partner.—Though a person lending money to one partner could not recover from the partnership, if he suspected it was to be applied to other purposes, under Civ. Code 1895, sec. 2654, that the partner had previously negotiated a loan for a corporation was not ground for such suspicion.—Bishop v. People's Bank of Calhoun, Ga., 67 S. E. 119.

99.——Notes.—A partnership note, signed by one member after dissolution, held binding upon the firm in favor of a creditor receiving it, if he had no notice that it was signed after dissolution.—Bank of Covington v. Cannon, Ga., 67 S. E. 83.

100. **Payment**—Presumption.—The presumption of payment of a debt secured by a specialty after 20 years may be rebutted only by satisfactory and convincing evidence.—Fidelity Title and Trust Co. v. Chapman, Pa., 75 Atl. 428.

101. **Perpetuities**—Restraints Upon Alienation.—The rule that a condition prohibiting the conveyance for a certain time of land devised in fee simple is void as a restraint upon alienation does not apply in its strictness, where the devisee is to trustees, and not directly to beneficiaries.—Christmas v. Winston, S. C., 67 S. E. 58.

102. **Principal and Agent**—Agency to Execute Sealed Instrument.—Authority to an agent to execute a sealed instrument in the absence of a principal must be in writing under seal.—Dalton Buggy Co. v. J. H. Wood, Son & Bro., Ga., 67 S. E. 121.

103.——Authority of Agent.—The authority of an agent may not be shown by his own declarations.—Becker v. Donalson, Ga., 67 S. E. 92.

104. **Principal and Surety**—Consideration.—A naked agreement between a principal maker of a note and the payee to extend the time of payment without consideration held not to discharge a surety.—Bartlett v. Pittman, Me., 75 Atl. 379.

105. **Railroads**—Care Required.—A carrier must exercise the utmost care for the safety of its passengers that would be used by very cautious persons under the same circumstances. —Brady v. Springfield Traction Co., Mo., 124 S. W. 1070.

106.——Crossing Accidents.—It would constitute negligence for a railroad, at a place where gates were maintained, to keep the gates up, whereby one drove an automobile on tracks, and was injured by train.—Louisvivlle & N. R. Co. v. Eckman, Ky., 125 S. W. 729.

107. **Receivers**—Sale of Property.—A sale of property by a receiver to himself, to his wife, or to a corporation in which he is a director, is contrary to public policy, and voidable.—South Georgia Bldg. & Inv. Co. v. Mathews, Ga., 67 S. E. 127.

108. **Sales**—Immoral Consideration.—A contract for the sale of furniture, on credit, to the keeper of a bawdyhouse, with the knowledge that it was to be there used, held not illegal.—Belmont v. Jones House Furnishing Co., Ark., 125 S. W. 651.

109.——Sale by Sample.—In an action for the price of goods sold by sample, the burden is on the seller to show that the goods were up to the sample.—Bodenmann Mfg. Co. v. Lesser, 121 N. Y. Supp. 335.

110.——Warranties.—Where plaintiff sold defendant a second-hand sewing machine, his statement that it was in very good condition was only an expression of opinion.—Ginsberg v. Lawrence, 121 N. Y. Supp. 337.

111. **Specific Performance**—Sufficiency of Performance by Plaintiff.—A party desiring to enforce a contract must show that he has done, or offered to do, all on his own part which would cast upon the other party the duty of doing what he is undertaking to force him to do.—Curtis v. Sexton, Mo., 125 S. W. 806.

112. **Street Railroads**—Use of Streets.—Though street cars are rightfully in the streets and have a right-of-way, pedestrians may also rightfully use the streets, and until they are aware of the approach of the car, they may walk across the tracks.—Leach v. Owensboro City Ry. Co., Ky., 125 S. W. 708.

113. **Taxation**—Sale of Land for Taxes.—A sale of more land than is necessary to pay the taxes is invalid.—Stevens v. Goodenough, Vt., 75 Atl. 398.

114. **Vendor and Purchaser**—Bona Fide Purchasers.—A vendor in a conditional sale failing to file the contract, cannot interfere with a bona fide purchaser of the property sold.—Mathews Piano Co. v. Markle, Neb., 124 N. W. 1129.

115.——Bona Fide Purchasers.—Where the vendor of a railroad right-of-way informed the agent of the company that he held only a life estate, the company cannot claim to be a purchaser without notice as to the remaindermen.—Southern Ry. Co. v. Carroll, S. C., 67 S. E. 4.

116.——Estoppel of Purchaser.—Where a person is let into possession of land under a contract of sale, he is a tenant at will of the vendor, and the principle that a lessee cannot dispute the lessor's title extends to him.—Bond v. Beverly, N. C., 67 S. E. 55.

117.——Recitals in Conveyance.—If in deranging title, one deed refers to another, the purchaser is constructively bound by all that the deed referred to would have disclosed, and buys subject to any infirmity there discoverable. —Smith v. Fuller, N. C., 67 S. E. 48.

118.——Tender of Deed.—Where plaintiff had the right, under a contract with defendant and his then partner, to reconvey land purchased of them for a certain consideration, his notice of election, accompanied by a demand for more than was due him under the contract, was insufficient.—Curtis v. Sexton, Mo., 125 S. W. 806.

119. **Wills**—Construction.—It will be presumed, in the absence of language in a will repelling the inference, that the language used was employed in the light of the settled meaning which the law attaches thereto.—Clore v. Smith, Ind., 90 N. E. 917.

120.——Construction.—If it is doubtful whether a legacy is vested in contingent, the doubt must be dissolved in favor of a vested estate.—In re Smith's Estate, Pa., 75 Atl. 425.